No. 09-790

Supreme Court, U.S.
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In The

Supreme Court of the United States

EDMUND ZAGORSKI,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF PHYSICIANS FOR HUMAN RIGHTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a "security" justification for abusive pretrial confinement precludes, as a matter of law, a determination that the circumstances of confinement impermissibly coerced the making of custodial statements.

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INTEREST OF THE *AMICUS CURIAE*[1]

Physicians for Human Rights (PHR) is a non-profit organization that mobilizes health professionals to advance health, dignity, and justice. Harnessing the specialized skills, rigor, and passions of doctors, nurses, public health specialists, and scientists, PHR investigates and exposes human rights violations.

PHR has special interest and experience in identifying and preventing psychological torture. Subjecting an individual to inherently coercive techniques like those at issue in this case causes profound short- and long-term harm. Individuals subject to extensive solitary confinement, sensory deprivation, and exposure to extreme temperatures suffer from immediate physical and psychological effects, some of which are permanent. These effects make it difficult or impossible for individuals to act voluntarily and violate principles of basic human decency.

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[1] The parties were notified at least 10 days prior to *amicus curiae*'s intent to file this brief, and provided written consent to filing that has been submitted to the Clerk of Court. Pursuant to Supreme Court Rule 37.6, counsel for the *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

The United States Constitution prohibits admitting involuntary statements against criminal defendants. Statements caused by inherently coercive conditions of State confinement are involuntary. When arrested, Mr. Zagorski invoked his right to remain silent and unequivocally requested the assistance of counsel. After fifty-two insufferable days, isolated in a sweltering metal box without sensory stimulation, Mr. Zagorski's will was broken: if he could choose how and when he would die, he would talk.

Mr. Zagorski's decision to seek an audience with police, and the statements he made at the resulting meeting, were each the result of inherently coercive conditions. Medical analysis of the record illuminates the extent of his suffering and the impact his confinement had on his psychological and physiological control. The abhorrent conditions of State detention overbore Mr. Zagorski's body and will, rendering his actions the product of abusive treatment – not choice. The statements should not have been admitted. With such clear error, and life in the balance, this Court should grant the petition for certiorari.

ARGUMENT

I. STATEMENTS ZAGORSKI MADE AS A RESULT OF HIS TORTUROUS CONFINEMENT ARE INVOLUNTARY AND INADMISSIBLE.

Arrested in May of 1983, Mr. Zagorski invoked his rights to remain silent and to counsel. The State of Tennessee then placed Mr. Zagorski in a windowless, unventilated 8' x 8' steel box. After fifty-two days of near total isolation and sensory deprivation – a period punctuated by an oppressive heat wave – Mr. Zagorski was physiologically compromised and psychologically disturbed. Thirty pounds lighter and despondent, he offered a confession in return for the ability to dictate the terms of his execution. Subjected to harsh confinement conditions similar to those used for the express purpose of "breaking" pretrial detainees, it is little surprise that Mr. Zagorski's will was broken. The State's confinement compromised Mr. Zagorski's ability to act volitionally, resulting in the statements that implicated him in criminal activity. The statements should be suppressed.

A. The Inculpatory Statements At Issue Were The Product of Inhumane Confinement, Not Choice.

Mr. Zagorski's inculpatory statements were products of his treatment by the State, not voluntary choice, and are inadmissible. The Fourteenth

Amendment's Due Process Clause, both independently and as it incorporates the Fifth Amendment's Self-Incrimination Clause, prohibits admitting involuntary statements into evidence. *Dickerson* v. *United States*, 530 U.S. 428, 433 (2000). Voluntariness is determined after an evaluation of "whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961). If, in the totality of the circumstances, a defendant's will was overborne by state-created circumstances, his statements are involuntary and inadmissible. *Dickerson*, 530 U.S. at 434 (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973)); *Withrow* v. *Williams*, 507 U.S. 680, 689 (1993); *Colorado* v. *Connelly*, 479 U.S. 157, 165 (1986).

Only statements made as a result of some state action are involuntary and inadmissible. "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause." *Connelly*, 479 U.S. at 167. But the motivations behind the requisite government action are, and should be, irrelevant to the inquiry. Statements must be analyzed from the point of view of the defendant, assessing "the psychological impact" of the conditions on the accused and "evaluat[ing] the legal significance" of his reaction. *Schneckloth*, 412 U.S. at 226 (citing *Culombe* v. *Connecticut*, 367 U.S. 568, 603 (1961)). The circumstances of detention and interrogation,

and their effect on the accused, are determinative; the subjective intent and stated or real needs of law enforcement officials have *no* bearing on the question. *Moran* v. *Burbine*, 475 U.S. 412, 423 (1986) ("[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights."); see also *Davis* v. *North Carolina*, 384 U.S. 737 (1966) (extended detention, repeated interrogation, and meager diet not used for interrogative purpose, but nonetheless effected an involuntary statement that must be excluded); *Townsend* v. *Sain*, 372 U.S. 293, 307, 309 (1963), overruled on other grounds, *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1 (1992) (drug-induced confession inadmissible even when police did not provide medication for interrogative effect; also citing *Blackburn* v. *Alabama*, 361 U.S. 199 (1960) as an example of a case where the Court "held irrelevant the absence of evidence of improper purpose on the part of the questioning officers.").

B. The State Confined Zagorski in Intolerable and Inherently Coercive Conditions.

The State's inhumane treatment of Mr. Zagorski was inherently coercive. For fifty-two days, Mr. Zagorski resided in a windowless, unventilated 8' x 8'

metal box. C.A. App. 509-13, 555-57.[2] He could only see what was illuminated by a dim bulb that provided light insufficient to read and any ambient light filtered through a small peep-hole in the door. *Id.* at 510.[3] For nearly every minute of fifty-two days, Mr. Zagorski was alone, without human contact or fresh air, without the ability to exercise his body or control his mind, only leaving his personal prison for a handful of court appearances and trips to the emergency room caused by the confinement itself. See *id.* at 85; 636-47.[4]

Mr. Zagorski's health rapidly deteriorated. Less than two weeks after his solitary confinement in the metal box began, Mr. Zagorski reported extensive mental anguish, resulting in a trip to an emergency room where doctors noted irrational actions and a rash brought on by nerves. *Id.* at 388.[5] At this point, Mr. Zagorski had already been isolated longer than allowed by a federal court order, which specifically

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[2] *Zagorski* v. *Bell*, No. 06-5532 (6th Cir.) Joint App., Petr.'s Response Resp.'s Mot. Summ. J., Ex. 3 (testimony of Sheriff Emery in *Douglas* v. *Emery*); *id.* at Ex. 7 (testimony of Robertson County Lieutenant Elvis Wilson, Apr. 1, 1984 hearing in *Douglas* v. *Emery*).

[3] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 8 (Motion To Be Removed From Solitary Confinement).

[4] Mot. Supp. (testimony of Ted Emery); Petr.'s Response Resp.'s Mot. Summ. J., Exs. 18-22 (J.H.J. Emergency Room Records).

[5] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 10 (June 18, 1983, Examination: Progress Notes).

enjoined Sheriff Emery from segregating any individual for more than ten days. C.A. App. 503-08.[6]

A few weeks later, Mr. Zagorski was taken to the emergency room "sweating [and] anxious," suffering from an "uncontrollable rage." C.A. App. 388.[7] His knuckles were bleeding from having beaten the wall. *Id.* at 618-19.[8] He was discharged back to his cell but within hours was back at the hospital, diagnosed with the same acute anxiety. *Id.* at 620-21.[9]

Mr. Zagorski's condition further devolved as Robertson County sweltered in unusually brutal heat. *Id.* at 628-33.[10] As hot or hotter than it was outdoors, the conditions inside Zagorski's isolation chamber were even worse. The Sheriff candidly admitted that the jail's only ventilation system had been "inoperative since the jail was built." *Id.* at 510-13.[11] After a week of external temperatures exceeding 90 degrees Fahrenheit, Mr. Zagorski overdosed on Valium in an

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[6] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 2 (*Douglas* v. *Emery*, Agreed Order).

[7] Petr.'s Response Resp.'s Mot. Summ. J.

[8] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 11 (July 3, 1983, J.H.J. Hospital Emergency Room Record, 12:53 a.m.).

[9] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 12 (July 3, 1983, J.H.J. Hospital Emergency Room Record, 1:10 p.m.).

[10] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 16 (National Weather Service official temperature records).

[11] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 3 (testimony of Sheriff Emery in *Douglas* v. *Emery*).

apparent suicide attempt. C.A. App. 636-37.[12] Immediately returned to his isolated sweatbox, Mr. Zagorski reappeared in the emergency room two days later after another acute anxiety attack. *Id.* at 638-39.[13] He told doctors he wanted to "sleep 'til the police fry [me]." *Ibid.* On July 20, he appeared in court "listless and dazed" during an unsuccessful appeal to be removed from isolation. *Id.* at 634-35.[14]

On July 22, the 100 degree heat destroyed crops and killed livestock. *Id.* at 623.[15] Adherence to current federal regulations would have protected the dairy cows and other livestock that died during that heat wave – they guarantee adequate fresh air, ventilation, and temperature regulation for organic livestock, 7 C.F.R. § 205.239 (2009) – but Mr. Zagorski was still confined in a jail with an inoperable ventilation system and in a cell that authorities had never used before. See C.A. App. 85, 93; 510-13.[16] In transit, dogs and cats cannot be kept in heat

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[12] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 18 (July 16, 1983, J.H.J. Hospital Emergency Room Record).

[13] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 19 (July 18, 1983, J.H.J. Hospital Emergency Room Record).

[14] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 17 (*Suspect Bound Over In Drug Deal*, NASHVILLE BANNER, July 21, 1983).

[15] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 13 (*Heat Reaches 100 Degrees; Crops Damaged*, ROBERTSON COUNTY TIMES, July 28, 1983, at 1a).

[16] Mot. Supp. (testimony of Ted Emery); *id.* (testimony of Ronnie Perry); Petr.'s Response Resp.'s Mot. Summ. J., Ex. 3 (testimony of Sheriff Emery in *Douglas* v. *Emery*).

exceeding 85 degrees Fahrenheit for more than four consecutive hours, 9 C.F.R. § 3.5(a) (2009), but Mr. Zagorski was in his unventilated, metal-walled cell for almost every hour of the vicious heat wave.

At the peak of the heat wave, Mr. Zagorski sent a note asking to speak with Sheriff Emery or Deputy Perry. C.A. App. 86-87.[17] He received no immediate response, suffering for two days before appearing in the hospital on July 24, complaining of insomnia and numbness in his extremities. During that visit, Doctor Houg noted that he was exhibiting "poor judgment," only to medicate him further and dispatch him to his cell. *Id.* at 640-41.[18]

The multiple emergency room visits resulted in a heavy diet of tranquilizers and anti-psychotic medicine, further diminishing Mr. Zagorski's capacity to think and act. See *id.* at 614-17; 620-21; 636-37; 640-41.[19] The medications also made his captivity more risky, enhancing the likelihood of heat stroke and weakening his ability to tolerate the effects of his torturous confinement – compare part I.C.

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[17] Mot. Supp. (testimony of Ronnie Perry).

[18] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 20 (July 24, 1983, J.H.J. Emergency Room Record).

[19] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 10 (June 18, 1983, Examination: Progress Notes); *id.* at Ex. 12 (July 3, 1983, J.H.J. Hospital Emergency Room Record, 1:10 p.m.); *id.* at Ex. 18 (July 16, 1983, J.H.J. Hospital Emergency Room Record); *id.* at Ex. 20, *supra*, n. 18.

After three more 97 degree days, Mr. Zagorski again asked to speak with Deputy Perry. C.A. App. 88.[20] He could take no more. He began by telling Deputy Perry that he would "confess to these murders . . . if you all would let me pick the type of execution and the date and time of execution." *Id.* at 92-93.[21]

The treatment described above was barbaric and more deplorable than in other cases where this Court suppressed inculpatory statements. See, *e.g.*, *Brooks* v. *Florida*, 389 U.S. 413, 414-15 (1967) (confession made after two weeks in "windowless sweatbox" excluded; treatment called a "shocking display of barbarism" and statements suppressed); *Davis*, 384 U.S. at 745-46 (1966) (excluding inculpatory statements made after 16 days of detention and interrogation); see also *Ammons* v. *Mississippi*, 80 Miss. 592, 595, 32 So. 9, 10 (1902) (confession procured by confinement in cramped sweatbox involuntary and inadmissible).

Mr. Zagorski disintegrated under State care. When arrested, Mr. Zagorski invoked his right to remain silent and unequivocally requested the assistance of counsel. After fifty-two insufferable days,

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[20] Mot. Supp. (testimony of Ronnie Perry).

[21] Mot. Supp. (testimony of Ronnie Perry). Despite this offer, Mr. Zagorski never confessed to murdering either victim; he admitted only his involvement in the transaction that led to their deaths.

Mr. Zagorski only wanted to choose how and when he would die.

C. The Inherently Coercive Conditions Caused Significant, Observable Physical and Psychological Harm.

The four inherently coercive aspects of Mr. Zagorski's detention – constant isolation, sensory deprivation, heat exposure, and heavy medication – deeply affected his physical and mental health, and yielded an involuntary inculpatory statement.

1. Isolating Zagorski for Fifty-two Days Compromised His Ability to Make Voluntary Decisions.

Isolated from all friendly human contact for almost two months, Mr. Zagorski suffered devastating psychological and physiological damage that rendered him incapable of making voluntary decisions as important as waiving constitutional rights. No longer able to make deliberate or conscious choices, he was unable to understand his rights, let alone effectively exercise them.

Extended isolation wreaks havoc on the mind and body. Without any face-to-face interaction with other human beings and the mental stimulation of conversation, individuals begin to deteriorate. Being isolated for periods as short as two hours disrupts normal mental function, producing temporal and spatial disorientation, inability to think, concentrate,

or reason; replacing normal processes with anxiety and paranoia. Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by US Forces*, 10 (2005), *available at* http://physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf; Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax"* 49 CONFINEMENT, CRIME & DELINQUENCY 1, Jan. 2003 at 124-56. Isolation for less than a week in domestic prisons has caused despair similar to that experienced by prisoners of war. See Dr. Stuart Grassian, M.D., *Psychiatric Effects of Solitary Confinement*, 22 J.L. & POL'Y 325, 343-44 (2006), citing Milton Meltzer, *Symposium #3: Factors Used to Increase the Susceptibility of Individual to Forceful Indoctrination, Group For the Advancement Of Psychiatry,* 96-103 (1956). Extended isolation exponentially increases the strain and damage to an individual's mind. *Break Them Down*, *supra* 11, at 59-69; see also Grassian, *supra* 11, at 333-343. Experts uniformly agree: "there is not a single published study of solitary or supermax-like confinement" that failed to result in negative psychological effects. Haney, *supra* 12, at 124.

There are also severe physiological effects of extended isolation. Prolonged isolation results in increased stress, abnormal neurendocrine function, changes in blood pressure and inflammatory stress responses. Andrew Steptoe, et al., *Loneliness and neurendocrine, cardiovascular and inflammatory stress responses in middle-aged men and women*, 29

PSYCHONEUROENDOCRINOLOGY 29, 593-611 (2004) as cited in Physicians for Human Rights and Human Rights First, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, August 2007, at 32, *available at* http://physiciansforhumanrights.org/library/documents/reports/leave-no-marks.pdf). Indeed, the effect of extended isolation "often resembles an organic brain syndrome" – a physical disease identified by agitation, confusion, and acute, lasting brain function decline. C.A. App. 388[22] citing Grassian, *supra* 12, at 333-343; see also Organic Brain Syndrome, http://www.nlm.nih.gov/medlineplus/ency/article/001401.htm.

2. Deprivation of All Sensory Stimuli Exacerbated Zagorski's Mental Anguish.

Depriving Mr. Zagorski of sensory stimuli intensified the harmful effects of his isolated detention. By its nature, solitary confinement deprives individuals of ordinary sensory stimuli like human interaction and visual variety. But Mr. Zagorski was particularly disadvantaged. Without a breath of fresh air, sunlight, or normal physical exercise, Mr. Zagorski was confined in a foreign world.

Sensory deprivation has significant cognitive effects. In one well-known experiment, volunteer

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[22] Petr.'s Response Resp.'s Mot. Summ. J.

subjects were placed in a tank respirator that eliminated or masked most sensory stimuli. Subjects spent anywhere between ninety-eight minutes and thirty-six hours in this deprivation tank. Donald Wexler, et al., *Sensory Deprivation*, 79 American Medical Association 6, ARCHIVES OF NEUROLOGY AND PSYCHIATRY, 225 (1958). The volunteers demonstrated many adverse psychological effects of this deprivation, including an inability to concentrate effectively, daydreaming and fantasy, illusions, delusions, and hallucinations. Sensory deprivation caused some subjects to focus inwardly and progressively lose touch with reality, and caused all subjects to make judgmental errors. *Ibid.* Lack of sensory stimuli induced unbearable stress and pain, causing more than half of the volunteers to prematurely terminate their participation in the study. *Ibid.*

Humans subjected to confinement like Mr. Zagorski's develop psychomotor and cognitive responses that would be clinically diagnosed as depression and in some cases posttraumatic stress disorder. Symptoms include apathy, helplessness, and hopelessness. Physicians for Human Rights, *Aiding Torture: Health Professionals' Ethics and Human Rights Violations Revealed in the May 2004 CIA Inspector General's Report*, August 2009, at 4, *available at* http://physiciansforhumanrights.org/library/documents/reports/aiding-torture.pdf. The feelings attendant to sensory deprivation like that to which Mr. Zagorski was exposed may overcome a person's power to exercise his will.

3. Zagorski's "Sweatbox" Drained Him Both Mentally and Physically.

Exposure to extreme temperatures for even short periods can cause long-lasting physiological and psychological harm. Extreme heat can cause dehydration, anxiety, confusion, visual disturbances, lethargy, and heat stroke, a life-threatening heat related condition involving dysfunction of the central nervous system (brain and spinal cord) that can progress to coma or death. James L. Glazer, *Management of Heatstroke and Heat Exhaustion*, 71 AM. FAM. PHYSICIAN 11, 2133-40 (2005), *available at* http://www.aafp.org/afp/2005/0601/p2133.html.

Mr. Zagorski doubtlessly suffered deleterious effects from the heat, and may have suffered from heat stroke. A few hours in temperatures exceeding humans' thermal maximum – 107 degrees Fahrenheit – can result in heat stroke. Nannette Lugo-Amador, et al., *Heat Related Illness*, Emergency Medical Clinics of North America 22, 315-327 (2004). "It does not take long either to boil an egg or to cook neurons." David Hamilton, *The Immediate Treatment of Heat Stroke*, 31 ANESTHESIA 1, 270-272 (1976). Mr. Zagorski was kept in a cell that was as hot or hotter than it was outdoors, where temperatures peaked at 100 degrees on July 22nd. C.A. App. 510-13.[23] Two of the State-prescribed medications, Haldol and Vistaril,

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[23] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 3 (testimony of Sheriff Emery in *Douglas* v. *Emery*).

administered on July 3rd and 18th respectively, predisposed him to heat stroke. *Id.* at 619, 639;[24] Lugo-Amador, *supra* 15, at 320; Glazer, *supra* 15, at 2135-37.

Heat stroke or no, Mr. Zagorski suffered from the sweltering temperatures. The central nervous system responses associated with heat illness – including confusion, delirium, ataxia, and potentially seizures and coma – impair the very act of cognition, imperiling an individual's control of his actions, thoughts, and movements. Thomas A. Waters, *Heat Illness: Tips for Recognition and Treatment*, 68 CLEV. CLINIC J. MED. 8, August 2001 at 685-687, *available at* http://www.ccjm.org/content/68/8/685.full.pdf+html.

4. By Heavily Medicating Zagorski, the State Diminished His Capacity to Reason While Intensifying the Other Harmful Effects of His Confinement.

Powerfully medicated, Mr. Zagorski's capacity for reasoning and comprehension was significantly reduced. A regimen of potent anti-psychotic drugs and tranquilizers diminish an individual's capacity for awareness or understanding of a situation and ability to make deliberate and conscious choices regarding

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[24] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 11 (July 3, 1983, J.H.J. Hospital Emergency Room Record); *id.* at Ex. 19 (July 18, 1983, J.H.J. Hospital Emergency Room Record).

exercise of legal rights. Though meant to alleviate the effects of physical and mental deprivations, both the need for and the effects of such medication provide evidence that Mr. Zagorski was not mentally capable to make reasoned statements or decisions regarding constitutional rights.

Mr. Zagorski was prescribed Haldol – an anti-psychotic drug – on two separate occasions. C.A. App. 614-19.[25] Haldol is known to cause drowsiness and confusion, especially during initial use, and is associated with restlessness, anxiety, agitation, depression, and catatonic-like behavior. AMERICAN SOCIETY OF HEALTH-SYSTEM PHARMACISTS, AHFS DRUG INFORMATION, 2508-13 (2009).

Apparently insufficiently medicated, Mr. Zagorski was administered three different tranquilizers within sixteen days – Valium, Librium, and Serax – each drug known to cause drowsiness, ataxia, fatigue, dizziness, weakness and confusion. *Id.* at 2586-95 (Benzodiazepines);[26] C.A. App. 618-21;

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[25] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 10 (June 18, 1983, Examination: Progress Notes); *id.* at Ex. 11 (July 3, 1983, J.H.J. Hospital Emergency Room Record, 12:53 a.m.).

[26] Valium, Librium, and Serax are brand names for the generic drugs Diazepam, Chlordiazepoxide, and Oxazepam, respectively, which are classified as Benzodiazepines and share the same properties. See Physicians Desk Reference, 62nd Edition 2765, 3299 (2008); see also AMERICAN SOCIETY OF HEALTH-SYSTEM PHARMACISTS, AHFS DRUG INFORMATION, 2612 (2009).

636-37.[27] Roughly ten percent of patients taking these drugs experience paradoxical central nervous system stimulation resulting in talkativeness, excitement, mania, insomnia and restlessness. Physicians Desk Reference, 62nd Edition 2765-66, 3299-300 (2008); see also AHFS DRUG INFORMATION, *supra* 16, at 2590. Mr. Zagorski was also prescribed Vistaril, an anti-anxiety medication with side effects including drowsiness, ataxia, dizziness, weakness, headaches and agitation. C.A. App. 638-39;[28] see AHFS DRUG INFORMATION, *supra* 17, at 2629-31 (Hydroxyzine).[29]

D. By July 27, Zagorski Had Lost Control of His Thoughts and Actions and Was Incapable of Reasoned, Voluntary Action.

Physically weakened and psychologically crippled, on July 27 Mr. Zagorski was a broken man no longer in control.

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[27] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 11 (July 3, 1983, J.H.J. Hospital Emergency Room Record, 12:52 a.m.); *id.* at Ex. 12 (July 3, 1983, J.H.J. Hospital Emergency Room Record, 1:10 p.m.); *id.* at Ex. 18 (July 16, 1983, J.H.J. Hospital Emergency Room Record).

[28] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 19 (July 18, 1983, J.H.J. Hospital Emergency Room Record).

[29] Vistaril is the brand name for the generic drug Hydroxyzine. See http://www.drugs.com/mtm/vistaril.html (last visited February 2, 2010).

Mr. Zagorski's physical state was severely compromised by this deplorable detention. He was outwardly changed – having lost 30 pounds and injuring his knuckles by badly beating them against the walls of his cell, C.A. App. 635[30] – but also likely suffering other physical manifestations of his torturous detention, including impaired circulatory, nervous, and neuroendocrine function. See *Davis*, 384 U.S. at 746 (physical effects of confinement have substantial effect on voluntariness). He also exhibited perceptible psychological harm, with frequent attacks of anxiety and uncontrollable rage, self-abusive and suicidal behavior, confusion, and disorientation. He was treated with powerful psychiatric drugs, several of which can impair the ability to think clearly, and some of which lower the level of consciousness and self-control.

The signs and symptoms described in Mr. Zagorski's case are highly consistent with extreme physical and psychological duress, with predictable global impacts on his entire nervous system. The physiological stresses on his nervous system impaired Mr. Zagorski's brain function and his ability to exercise higher cognitive function like voluntary decision making. This effect is demonstrated in a loss of his self-control, a loss of his autonomy, and a loss of the ability to control his thoughts or effect his will.

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[30] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 17 (*Suspect Bound Over in Drug Deal*, NASHVILLE BANNER, July 21, 1983).

The record demonstrates that Mr. Zagorski's physical and mental condition withered during his detention, causing clear, observable signs of his inability to reason and volitionally act. By the time of the suspect statements, Mr. Zagorski was incapable of reasoned, voluntary action.

The impact of his confinement is and was apparent: the man who made inculpatory statements was not the Mr. Zagorski who appeared in the Robertson County Jail in May. His will overborne by intolerable State detention, Mr. Zagorski's inculpatory statements were not the product of his volition and are inadmissible.

II. THIS COURT SHOULD CONSIDER THE HISTORICAL USE OF THE SAME TYPE OF INHERENTLY COERCIVE CONFINEMENT CONDITIONS TO WHICH THE STATE SUBJECTED ZAGORSKI

It is not surprising that the State's treatment broke Mr. Zagorski. The techniques used against him are traditional methods of torture often used explicitly for the purpose of coercing confessions. In evaluating the totality of the circumstances surrounding Mr. Zagorski's confession, this Court should consider the historical lineage of the types of harsh confinement to which he was subjected – harsh confinement often used to extract unwilling, involuntary confessions from those not yet convicted of any crime.

Oppressive foreign regimes treat criminal suspects and political dissidents much like the State treated Mr. Zagorski. Chinese Communists used isolation, sensory deprivation, and extreme temperatures to extract false confessions from American service members during the 1950s. Scott Shane & Mark Mazzetti, *In Adopting Harsh Tactics, No Look at Past Use*, N.Y. TIMES, Apr. 22, 2009, at A1, *available at* http://www.nytimes.com/2009/04/22/us/politics/22detain.html. Associated Press reporter Terry Anderson was held as a Hezbollah hostage in "a six-by-six-foot cell, with no windows, and light from only a flickering fluorescent lamp in an outside corridor." Atul Gawande, *Hellhole*, THE NEW YORKER, March 30, 2009, *available at* http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande. Much like Mr. Zagorski mutilated his knuckles against his cell, Mr. Anderson snapped, walking over to a wall and smashing his forehead into a bloody mess. *Ibid.*

The techniques used against Mr. Zagorski are shockingly similar to those used by the Eritrean government against political prisoners in December 2008, when "27 political prisoners, including three journalists arrested in 2001 . . . were held in searing heat in subterranean isolation cells." Eritrea: Country Summary, Human Rights Watch, http://www.hrw.org/sites/default/files/related_material/eritrea.pdf (last visited February 2, 2010). Four of the prisoners were "held in underground cells for five years without access to daylight." *Ibid.*

Isolation and heat exposure are not merely the novel tactics of far-off dictators and terrorists. Domestic officials have confined criminal suspects in small, extremely hot boxes since the Civil War. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post DNA World*, 82 N.C. L. REV. 891, 908-09 (2004). Their use flourished for the next several decades, particularly against minorities and otherwise unpopular detainees. Sam Kamin, *How the War on Terror May Affect Domestic Interrogations: The 24 Effect*, 10 CHAP. L. REV. 693, 697 (2007). The 1931 Wickersham Police Report noted officers "worked" prisoners using third degree tactics, including placement in a sweatbox described as "a small cell completely dark and arranged to be heated till the prisoner, unable to endure the temperature, will promise to answer as desired." 11 U.S. Wickersham Commission, National Commission on Law Observance & Enforcement, Report on Lawlessness in Law Enforcement, 47 (1931). Sweatboxes were also a favored corporal punishment for minority members of chain gangs. Alex Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: "The Negro Convict is a Slave,"* 59 J.S. LEGAL HIST. 85, 93 (1993).

Isolation, exposure to extreme temperatures, and manipulation of sensory stimuli were employed more recently by interrogators at Abu Ghraib, Afghanistan, and Guantánamo Bay. These tactics were initially *designed* to mimic the abusive, coercive methods used by Chinese interrogators to extract false confessions

from American service members. Shane & Mazzetti, *supra* 21, at A1.

Detainees at Guantánamo Bay were subjected to a system designed to "break people" through a combination of coercive tactics including solitary confinement and exposure to extreme temperatures. *Break Them Down*, *supra* 12, at 41. In one example, a detainee isolated for over three months "was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end)." *Id.* at 10 quoting Letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, Federal Bureau of Investigation to Major General Donald J. Ryder, Department of the Army (July 14, 2004) *available at* http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf. Interrogators in Afghanistan used severe sensory deprivation against detainees, forcing detainees to wear devices that blocked visual and aural stimulation. *Id.* at 40-41.

An International Committee of the Red Cross report found that in 2003, detainees at Baghdad International Airport were "held for nearly 23 hours a day in strict solitary confinement in small concrete cells devoid of daylight." International Committee of the Red Cross, Report of the International Committee of the Red Cross on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation, February

2004, ¶43, http://cryptome.org/icrc-report.htm. While the similarities to Mr. Zagorski's confinement are notable – compare Part I.B – the differences are more powerful: Iraqi detainees were not generally subject to abnormally extreme temperatures and were allowed an hour each day outside of their confinement. Excepting court appearances and the medical visits necessitated by his deplorable detention, Mr. Zagorski was isolated for fifty-two days before making the inculpatory statements at issue here. Notably, isolation of terrorist suspects for longer than thirty days needed approval from military command. *Break Them Down*, *supra* 12, at 94.

Interrogator motivation is irrelevant to the Due Process voluntariness analysis. *Moran*, 475 U.S. at 423. But the fact that the techniques used against Mr. Zagorski have so often been used for the purpose of extracting information from unwilling individuals is relevant when evaluating the likely "psychological impact" of the conditions on the accused. See *Schneckloth*, 412 U.S. at 226. Facing techniques traditionally used to torture and coerce, it is unsurprising that Mr. Zagorski was unable to effect his desire to remain silent. Isolation, sensory deprivation, and exposure to extreme heat substantially disrupt healthy minds, let alone those coursing with heavy medication. The statements were the product of confinement, not choice, and should be suppressed.

III. ZAGORSKI'S STATEMENTS SHOULD BE EXCLUDED EVEN IF THIS COURT ACCEPTS THE SIXTH CIRCUIT'S ANALYSIS

Even if this Court adopts the Sixth Circuit's novel Due Process analysis, it should not adopt the misapplication of that new rule. The Sixth Circuit created a "security exception" to the Fourteenth Amendment's Due Process Clause: because the State asserted a reason for the nature of Mr. Zagorski's detention, the Sixth Circuit believed that the causal chain between state activity and the statements was broken and the statements were admissible under *Connelly*. Pet. App. 9a. This test should be discarded for at least two reasons: (1) the Sixth Circuit's rationale finds no support in *Connelly*; and (2) the Sixth Circuit's test impermissibly allows the State to use evidence obtained in a matter that shocks the conscience so long as the means were related to a legitimate end.

A. The Sixth Circuit's Test Does Not Comport With *Connelly*.

The Sixth Circuit decision finds no support in *Connelly*. The statements in *Connelly* were excluded because they were not caused by state action, and the interrogators were unaware that they were not the product of the defendant's free will. In *Connelly*, the police took statements from a man who told them he wanted to confess because of a guilty conscience. *Connelly*, 479 U.S. at 160-61. They had no reason to suspect he was mentally disturbed; the revelations

about the "command hallucinations" occurred after the inculpatory statements were made. *Id.* at 161. Before they took any statements, the police officers in *Connelly* asked the defendant whether he had been drinking or had taken drugs, and read him his *Miranda* rights. *Id.* at 180. Reminded that he was under no obligation to speak to the police, the defendant said that he wanted to talk "because his conscience had been bothering him." *Id.* at 160.

In contrast, State officials knew or should have known that Mr. Zagorski was physically and psychologically distressed. They admitted that Mr. Zagorski had been placed in a container that would make them "go nuts." C.A. App. 627.[31] They knew how hot it was in the cell block, with its inoperative ventilation system. They knew that a federal court order prohibited extended solitary confinement, and that Mr. Zagorski had been isolated for far too long and in violation of that order. They knew Mr. Zagorski was highly medicated. And if they had forgotten these facts, they would be reminded of Mr. Zagorski's suffering by the way he started the July 27th conversation: "I'd confess . . . if you all would let me pick the type of execution and the date and time of execution." *Id.* at 92-93.[32]

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[31] Petr.'s Response Resp.'s Mot. Summ. J., Ex. 15 (statement of Ronnie Perry to Larry Wilks, Esq. and James Walton, Esq.).

[32] Mot. Supp. (testimony of Ronnie Perry).

Furthermore, there was *no security rationale* for granting Mr. Zagorski's despondent plea. The Sixth Circuit's novel approach only permits the use of detention techniques designed to improve jail security. Granting the suicidal, disturbed request of Mr. Zagorski had no relation to security, and the Sixth Circuit's misplaced exception to the Due Process Clause cannot authorize admitting the resulting statements.

At the time of his inculpatory statements, the questioning officers knew that Mr. Zagorski was under severe psychological and physiological stress, and they knew why that was the case. Admission of statements that were both caused by state action and taken by individuals who knew they were involuntary offends Due Process. The statements should be suppressed.

B. The Sixth Circuit's Security Exception Would Permit State Action That Shocks the Conscience.

The Sixth Circuit's novel analysis sets no outer bounds for state action. It cannot be true that the fruits of any act taken for legitimate penological objectives are admissible. Suppose that jail officials were worried that Mr. Zagorski was so disturbed and disruptive that prison safety required he be shackled at the wrists and ankles, his head immobilized, and his mouth gagged to prevent his further incitement of other detainees. They remove the gag each day to let

him eat, but otherwise it remains. After several days of such treatment, when the gag is removed at lunch, he offers to confess in exchange for better conditions, or even death. Statements made as a result of that treatment would most certainly be inadmissible, even though they were produced by good-faith actions taken toward an admittedly legitimate state interest. See generally *Moran,* 475 U.S. at 432; *Rochin* v. *California*, 342 U.S. 165 (1952). Mr. Zagorski was not bound and gagged, but his treatment was arguably more outrageous. When treatment of a detainee shocks the conscience, the resulting statements should be inadmissible, regardless of the legitimacy of the underlying state interest.

IV. THIS COURT CAN SUPPRESS THE INVOLUNTARY STATEMENTS WITHOUT INVOLVING ITSELF IN INTRACTABLE PROBLEMS OF PRISON ADMINISTRATION.

Excluding Mr. Zagorski's confession will not hamstring law enforcement officials who have legitimate penological reasons for restricting an inmate's liberty. Challenges to pretrial detainee and prisoner confinement that claim impingement of liberty interests or other Constitutional rights are evaluated under different balancing standards. See *Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Rhodes* v. *Chapman*, 452 U.S. 337 (1981). Convicts face deprivation of Constitutional rights when the balance of penological needs tilts against them. See *Turner* v. *Safley*, 482 U.S. 78 (1987).

But those cases are inapposite. The issue before this Court is whether the Constitution prohibits law enforcement officials from using the involuntary, coerced fruits of harsh confinement in criminal proceedings against those prisoners. Mr. Zagorski does not seek a writ of habeas corpus to alter the terms of his confinement; he seeks exclusion of an involuntary statement caused by state action.

The Petition is from a man about to be put to death for statements he involuntarily made. The intractable problems of prison administration are *sui generis*. This Court will not hamper prison officials by preventing an execution premised on a Due Process violation.

CONCLUSION

For the reasons set forth above, PHR respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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